

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE FOR THE TWENTIETH  
JUDICIAL DISTRICT AT NASHVILLE

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STATE OF TENNESSEE,  
Petitioner,

v.

ECKERD CORPORATION, a Delaware  
corporation,

Respondent.

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**ASSURANCE OF VOLUNTARY COMPLIANCE**

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This Assurance of Voluntary Compliance ("Assurance") is given by Eckerd Corporation of Largo, Florida ("Respondent" or "Eckerd"), to Paul G. Summers, Attorney General and Reporter for the State of Tennessee ("Attorney General") and Mark Williams, the Director of the Division of Consumer Affairs of the Department of Commerce and Insurance ("Division").

**WITNESSETH:**

Some of the facts and circumstances surrounding the execution of this Assurance are as follows:

A. The Division and the Attorney General conducted an investigation of specific business practices of Eckerd. These practices included allegedly submitting and causing to be submitted deceptive, unfair or misleading claims and requests for payment to consumers, the State of Tennessee, third-party payers and other persons, as defined in Tenn. Code Ann. § 47-18-103(7), by submitting claims or requests for payment for the value of full prescriptions when only a portion of the prescribed medication was initially delivered to the person or consumer. As a result of the investigation, the Division and the Attorney General determined that certain acts and practices of Eckerd violated the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101 *et seq.* (the "Act").

B. Eckerd denies any wrongdoing and asserts that at all times its dispensing and other business practices were in full compliance with applicable law, and denies that it is liable under any statutes, regulations or common law for any of the practices alleged or referenced in paragraph A or the State's Petition. Further, pursuant to Tenn. Code Ann. § 47-18-107(c), acceptance of this Assurance by Eckerd shall not be considered an admission of a prior violation of the Act. Eckerd waives the original ten (10) day notice pursuant to Tenn. Code Ann. § 47-18-108(a)(2) as to matters occurring prior to the date of entry of this Assurance.

C. Therefore, pursuant to Tenn. Code Ann. § 47-18-107, Eckerd desires to give this Assurance, and the Attorney General desires to accept it, in order to avoid the expense of litigation.

NOW, THEREFORE, acting pursuant to Tenn. Code Ann. § 47-18-107, Eckerd gives, the Attorney General accepts, and the Court approves the following assurances:

### **I. JURISDICTION**

1.1 Upon approval of this Court, the parties agree that this matter should be assigned to Circuit Court, Fifth Circuit, Judge Walter C. Kurtz because it has matters substantially connected to State of Tennessee *ex rel.* Louis H. Mueller v. Eckerd Corporation, No. 96C3683 assigned to that Part. The parties represent to this Court that for reasons of judicial economy this matter should be assigned to the same court as the *qui tam* lawsuit involving similar factual allegations upon approval of the Court.

1.2 Jurisdiction of this Court over the subject matter herein and over the person of Eckerd for the purposes of entering into and enforcing this Assurance is admitted. Jurisdiction is retained by this Court for the purpose of enabling the parties to apply for such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Assurance, including enforcement of compliance therewith and assessment of penalties for violation(s) thereof. Eckerd shall pay all court costs and reasonable attorneys' fees and any costs associated with any successful petitions to enforce any provision of this Assurance and the Agreed Order against Eckerd which has been simultaneously submitted to the Court.

### **II. VENUE**

2.1 Pursuant to Tenn. Code Ann. § 47-18-107, venue as to all matters between the parties relating hereto or arising out of this Assurance is solely in the Circuit Court of Davidson County, Tennessee.

### **III. BUSINESS PRACTICES**

Accordingly, it is hereby agreed that upon approval of the Court, Eckerd shall be permanently and forever enjoined and bound from directly or indirectly engaging in any of the practices set forth herein:

3.1 Eckerd shall be prohibited from directly or indirectly demanding or accepting payment(s) from any person for the value of a full prescription when only a portion of the prescribed medication is delivered to that person. 3

.2 Eckerd shall provide a copy of a notice to all current Eckerd pharmacists employed in Tennessee. The notice shall be a summary of paragraph

3.3 and the business practices section of this Assurance. Prior to the expiration of fifteen (15) days of the date of entry of this Assurance, Eckerd shall provide the proposed notice to the State for its consideration. Eckerd shall not distribute the notice until it has agreed in writing with the State that the content of the notice is acceptable. Eckerd shall have ninety (90) days from the date that the content of the proposed notice is determined acceptable by the State or the date of entry of this Assurance, whichever is later, to provide a copy of the notice to its pharmacists. Eckerd shall also have in place a method to ensure that all new Eckerd pharmacists receive the notice prior to filling prescriptions for Eckerd.

3.3 Eckerd shall be required to maintain and enforce a policy requiring that its employees not engage in false, deceptive or misleading acts or practices. In addition to Eckerd being required to maintain the general policy as described herein, Eckerd shall be specifically required to affirmatively notify, in the manner described in paragraph 3.2, all Tennessee pharmacists of the following:

The Tennessee Attorney General has advised Eckerd that the following acts or practices would be false, deceptive or misleading acts or practices and in violation of the Tennessee Consumer Protection Act:

(a) Directly or indirectly misinforming persons about the availability or accessibility of medication to any person seeking medication. Without limiting the scope of this provision, for example, it is false, deceptive or misleading to inform a consumer that the pharmacy does not have enough of a particular medication to fill a prescription when in fact the pharmacy does have the medication but the pharmacy is holding it for possible future demand or need.

(b) Directly or indirectly misinforming persons and/or failing to provide the true reason for providing less medication than the full amount prescribed to that person. Without limiting the scope of this provision, for example, it is false, deceptive or misleading to inform a consumer that the pharmacy is out of the consumer's medication and can only provide half of the needed medication when in fact the pharmacy does have the medication but the pharmacy is holding it for possible future demand or need.

(c) Directly or indirectly failing to affirmatively inform any person that less medication than the amount actually prescribed was provided to the person when the person does not receive the full prescription at the initial visit to the pharmacy.

(d) Directly or indirectly failing to affirmatively instruct any person of the need to return to the Eckerd store to obtain any additional medication actually prescribed in order to comply with his/her physician's care instructions when the person does not receive the full prescription at the initial visit to the pharmacy.

(e) Directly or indirectly making any representations or statements to a consumer that a transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law, in violation of Tenn. Code Ann. § 47-18-104(b)(12). Without limiting the scope of this section, a pharmacist would be in violation of this section, if he/she indicates that a consumer has received his/her full prescription if that is not in fact the case.

(f) Directly or indirectly representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or qualities that they do not have in violation of Tenn. Code Ann. § 47-18-104(b)(5). Without limiting the scope of this section, a pharmacist would be in violation of this section if he/she indicates that a consumer has received his/her full prescription if that is not in fact the case.

3.4 Eckerd shall be prohibited from directly or indirectly requiring any person to make any statement, in writing or otherwise, which is false, unfair, untrue, deceptive or misleading in order to receive a prescription which the person is desiring Eckerd to dispense. Without limiting the scope of this paragraph, Eckerd is specifically prohibited from requiring any person to initial or sign a log or other document indicating they have received the full prescription, if such is not the case.

3.5 Eckerd shall be prohibited from directly or indirectly representing that any person is receiving medication "free", "at no cost", "free of charge" (or term or phrase of similar import) when in fact the person will be charged for the medication when the person returns to pick up the remaining medication.

3.6 Eckerd shall be required to review any pharmacy employee's conduct if Respondent receives two or more complaints or other reliable information indicating that an employee has violated any provision of this Assurance in the State of Tennessee. In accordance with Respondent's policies and procedures, Respondent shall promptly discipline employees as may be reasonable under the circumstances for such employee misconduct, and review such records as may indicate whether the employee may have engaged in similar conduct during a reasonable period of time since the alleged incident to determine whether any violations of this Assurance occurred. Further, Respondent shall report any such findings to the Attorney General within ten (10) days of such determination of a violation if the conduct occurred within the State of Tennessee.

3.7 In order to ensure that Eckerd pharmacists in the State of Tennessee are fully informed about Eckerd's responsibilities under this Assurance and Eckerd's changes in its prescription filling procedures, Eckerd shall conduct a training session and/or provide written training materials regarding the requirements of this Assurance for/to Respondent's pharmacists in the State of Tennessee. The

training materials and/or training sessions shall include information designed to educate all said employees about the requirements of the Assurance. These training materials and/or sessions shall also include information regarding Respondent's policy prohibiting billing consumers, third party payers or governmental payers for a portion of a prescription not actually provided. Within ninety (90) days of entry of this Assurance, Respondent shall provide to the Attorney General a copy of the training materials provided to its Tennessee pharmacists and an affidavit stating and certifying that the training materials have been provided to all pharmacists in Tennessee along with a copy of Respondent's procedure for ensuring that all new pharmacists receive the training materials *prior* to engaging in dispensing prescriptions (other than under the direct supervision of a pharmacist during training).

3.8 Within ninety (90) days of entry of this Assurance, Eckerd shall (so long as required by law, regulation, rule or other judicial order including a judicial order requiring the state of Tennessee to require the posting) post the notice attached as Exhibit A in a clear and conspicuous location in the pharmacy area of each of its Tennessee stores where persons attempting to pick up prescriptions can easily read the notice. Eckerd shall (so long as required by law, regulation, rule or other judicial order including a judicial order requiring the State of Tennessee to require the posting) also post in the same fashion any updated versions of Exhibit A within ninety (90) days of receiving any such updates. The notice shall be of the same size as that provided by the State of Tennessee.

#### **IV. PAYMENT OF ATTORNEYS' FEES AND COSTS TO THE STATE**

4.1 Eckerd shall pay the sum of One Hundred Thirty-Five Thousand Dollars and 00/100 Cents (\$135,000.00) to the State of Tennessee for reasonable and appropriate attorneys' fees and costs of investigation, prosecution, auditing and monitoring for compliance of this matter, which may be used for consumer protection purposes, qui tam/false claims purposes, health care fraud purposes, and unfair or deceptive trade practices purposes at the sole discretion of the Attorney General. Said payment shall be made by check backed by good and sufficient funds, made payable to the "State of Tennessee-Attorney General" and provided to the Attorney General within 10 days of entry of this Assurance and the Agreed Orders and Settlement Agreement contemporaneously executed by Eckerd.

#### **V. PAYMENT TO THE GENERAL FUND**

5.1 To resolve Eckerd's potential liability pursuant to the Tennessee Medicaid False Claims Act, Tenn. Code Ann. § 71-5-182 for restitution and damages due the State of Tennessee for its share of Medicaid dollar overpayments, Eckerd shall pay the sum of Sixty-Five Thousand Dollars and 00/100 Cents (\$65,000.00) to the State of Tennessee - General Fund to be used for the benefit of the Bureau of TennCare. Said non-punitive payment shall be made by check backed by good and sufficient funds, made payable to the "State of Tennessee - General Fund" and provided to the Attorney General within ten (10) days of entry of this Assurance and the Agreed Orders and Settlement Agreement contemporaneously executed by Eckerd.

#### **VI. MONITORING AND COMPLIANCE**

6.1 Upon request, Eckerd shall provide books, records and documents to the Attorney General at any time, and further, to informally or formally under oath, provide testimony and other information to the State relating to compliance with this Assurance. Eckerd shall make any requested information available within fifteen (15) business days of the request or at such other time as the parties can mutually agree in writing, at the Office of the Attorney General in Nashville, Tennessee or at any other location within the State of Tennessee that is mutually agreeable in writing to Eckerd and the Attorney General. This section shall in no way limit the State's right to obtain documents, information, or testimony in accordance with any federal or state laws, regulations, or rules.

6.2 Within one hundred and twenty (120) days of entry of this Assurance, Eckerd and the State of Tennessee shall hold compliance meetings to confirm that Eckerd has previously instituted company practices within its pharmacies to conform to the injunctive provisions of this Assurance and Eckerd's previously initiated company policy changes. Upon request of the Office of the Attorney General, a second meeting shall be held approximately ninety (90) days after the first meeting. Eckerd shall cooperate fully with the State of Tennessee's efforts to determine Eckerd's compliance with this Assurance and Eckerd's initiated company policy changes. As part of this cooperation, Eckerd at its sole expense, shall provide personnel and documents to the representatives of the Attorney General's office to explain how Eckerd's practices are instituted company practices consistent with this Assurance. At the compliance meeting(s), Eckerd shall provide personnel for sworn testimony to confirm under oath that changes to Eckerd's company practices have been instituted and corrective action has been implemented to address problems referenced in the State's Petition and the business practices provisions of this Assurance. The exact dates of the meetings and locations shall be agreed in writing by the parties within thirty (30) days of entry of this Assurance. The Attorney General has the right to request additional compliance meetings to confirm compliance if he deems them necessary. Such additional meetings will be held within forty-five (45) days of the State's written request. The Attorney General has the right to retain experts at the State of Tennessee's expense to assist with the compliance process if he deems it necessary.

6.3 The State of Tennessee has the right to test shop Eckerd's pharmacies for the purpose of confirming compliance with this Assurance and state law. The test shoppers are not required to disclose that they are representatives of the State of Tennessee when making contact with Eckerd. Further, the State of Tennessee may record any or all aspects of its visit(s) to Eckerd's pharmacies in audio or video form without notice to Eckerd. The State of Tennessee agrees to conduct any such test shopping in a manner not to interfere with Eckerd's business operations.

## **VII. PRIVATE RIGHTS OF ACTION**

7.1 Pursuant to Tenn. Code Ann. § 47-18-107(e) and § 47-18-109, nothing in this Assurance shall be construed to affect any private right of action that a consumer or person may hold against Eckerd.

## **VIII. PENALTY FOR FAILURE TO COMPLY**

8.1 Pursuant to Tenn. Code Ann. § 47-18-107(c), Eckerd understands that upon execution and filing of this Assurance, any subsequent failure to comply with the terms hereof is *prima facie* evidence of a violation of the Tennessee Consumer Protection Act.

8.2 Eckerd understands that any knowing violation of the terms of this Assurance shall be punishable by civil penalties of not more than One Thousand Dollars (\$1,000.00) for each violation, in addition to any other appropriate penalties and sanctions, including but not limited to contempt sanctions and the imposition of attorneys' fees and civil penalties. Eckerd shall pay all court costs and reasonable attorneys' fees associated with any successful petitions to enforce this Assurance against Eckerd.

## **IX. REPRESENTATIONS AND WARRANTIES**

9.1 Eckerd represents and warrants that the execution and delivery of this Assurance is its free and voluntary act, that this Assurance is the result of good faith negotiations, and that Eckerd affirmatively represents that the Assurance and terms hereof are fair and reasonable. The parties warrant that they will implement the terms of this Assurance in good faith. Other than the Settlement Agreement referenced herein, no offers, agreements, or inducements of any nature whatsoever have been made to Eckerd by the State of Tennessee, its attorney or any employee of the Attorney General's Office or the Division of Consumer Affairs, or the Department of Health, the Bureau of TennCare, to procure this Assurance.

9.2 The respective parties represent that the signatories to this Assurance have authority to act for and bind such parties.

9.3 Eckerd will not participate, directly or indirectly, in any activity to form a separate entity or corporation for the purpose of engaging in acts prohibited in this Assurance or for any other purpose which would otherwise circumvent any part of this Assurance or the spirit or purposes of this Assurance.

9.4 Eckerd has provided the Attorney General's office with a copy of its new policy regarding alterations to its pharmacy practices to remedy the Attorney General's concerns about partially filling of prescriptions. The Attorney General states that assuming Eckerd's practices fully conform with the provided policy, Eckerd will be in compliance with paragraph 3.1 of the Business Practices section of this Assurance as it relates to partially filling prescriptions and adjudication of prescriptions.

9.5 Neither Eckerd nor anyone acting on its behalf shall state or imply or cause to be stated or implied that the Attorney General, the Division of Consumer Affairs, the Department of Health, the Bureau of TennCare, or any other governmental unit of the State of Tennessee approved, sanctioned, or authorized any practice, act, or conduct of Eckerd.

9.6 Acceptance of this Assurance by the State shall not be deemed approval by the State of any of Eckerd's advertising or other business practices.

9.7 Eckerd Corporation warrants and represents that it is the proper party to this Assurance. Eckerd

further acknowledges that the State expressly relies upon this representation and warranty, and that if it is false, misleading, deceptive, unfair or inaccurate, the State has the right to move to vacate or set aside this Assurance, or seek other remedies (including a request that Eckerd be held in contempt, if the State so elects).

9.8 The Attorney General and Reporter and the Division of Consumer Affairs warrant and represent that they are proper parties to this Assurance.

9.9 This Assurance may only be enforced by the Attorney General and Eckerd Corporation.

9.10 The titles and headers to each section of this Assurance are for convenience purposes only and are not intended by the parties to lend meaning to the actual provisions of the Assurance.

9.11 This document shall not be construed against the "drafter" because both parties participated in the drafting of this document.

9.12 Except for the agreement of the Attorney General and the Division of Consumer Affairs not to pursue Tennessee Consumer Protection Act of 1977 claims (Tenn. Code Ann. § 47-18-101, *et seq*) for facts arising from the allegations set forth in the State's Petition arising before the entry of this Assurance, nothing in this Assurance shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. In addition, except for the agreement of the Attorney General and the Division of Consumer Affairs not to pursue Tennessee Consumer Protection Act of 1977 claims (Tenn. Code Ann. § 47-18-101, *et seq*) for facts arising from the allegations set forth in the State's Petition arising before the entry of this Assurance, this Assurance shall not bar the State or other governmental entity from enforcing laws, regulations or rules against Eckerd.

9.13 This Assurance shall be binding and effective against the parties upon the entry of and court approval of the Assurance, Agreed Orders and Settlement Agreement.

9.14 This Assurance (and accompanying Agreed Order) and the Settlement Agreement and Agreed Order of Dismissal in State of Tennessee, ex rel. Louis H. Mueller v. Eckerd Corporation Case No. 96C3683 constitute the complete agreement of the parties with regard to the resolution of the matters set forth in the State's Petition and the Relator's Complaint. This Assurance is limited to resolving only matters set forth in the State's Petition which the Attorney General could commence pursuant to the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. § 47-18-101 *et seq.* for actions taken prior to the entry of this Assurance.

9.15 Eckerd and the Attorney General recognize that participation in the Tennessee Medicaid/TennCare program is dependent upon acceptance into a network by a Managed Care Organization ("MCO") and a Behavioral Health Organization ("BHO") and that MCOs and BHOs have discretion, so long as consistent with federal and state law, to set policies for participation in their networks. The Office of the



Tennessee Attorney General will not attempt to influence any MCO or BHO to exclude Eckerd from participation as a provider in a MCO or BHO network or otherwise take any action adverse to Eckerd due to the conduct described or referenced in paragraph A of the Witnesseth section. Notwithstanding any of the foregoing, the institution by the State, or any of its officers, departments, agencies, boards, commissions or instrumentalities of an administrative proceeding, except as released herein or in the Settlement Agreement (including exclusion as discussed in Paragraph 3 of the Settlement Agreement), shall not be considered an attempt to influence any MCO or BHO to exclude Eckerd from participation in a MCO or BHO network. Nothing herein shall prevent the Attorney General from providing copies of the Assurance and related settlement documents to any MCO or BHO or any other person upon request or from otherwise publicly disclosing or discussing the Assurance.

9.16 Nothing in this Assurance constitutes an agreement by the State of Tennessee concerning the characterization of the amounts paid hereunder for purposes of any proceeding under the Internal Revenue Code or any state tax laws.

9.17 Eckerd acknowledges that the State of Tennessee does not have the authority to release Eckerd from any claims or actions for debarment which may be asserted by private insurers or similar entities such as MCOs or BHOs that are paid on a capitated basis for providing health care to the state Medicaid/TennCare recipients. However, Department of Health, TennCare Bureau will not exclude Eckerd from participation in the Medicaid/TennCare program based upon the facts in the State's Petition which arose or existed prior to entry of this Assurance unless required to do so by the United States Department of Health and Human Services. Eckerd does not waive any defense it may have to any claim that may be asserted against it by a private insurer or similar entity such as a MCO or BHO.

9.18 Notwithstanding any term of this Assurance, specifically reserved and excluded from the scope and terms of this Assurance as to any entity or person (including Eckerd, its current and former officers, directors, employees, agents, affiliates, parent, shareholders, subsidiaries, successors or assigns) are any and all of the following:

(A) Any criminal liability or prosecution arising from the conduct described in the Relator's Complaint and the State's Petition;

(B) Any liability to the State of Tennessee (or its agencies) for any conduct other than the conduct described in the State's Petition;

(C) Any claims based upon such obligations as are created by this Assurance;

(D) Any potential criminal, civil or administrative claims arising under federal or state tax, individual licensing, certificate of need proceedings other than Medicaid Program recoupment; and

(E) Any private right of action that a consumer or person may hold against Eckerd.

9.19 Eckerd waives its right to appear at any hearing to approve this Assurance. Eckerd specifically agrees that the State may obtain approval of this Assurance and the accompanying Agreed Order in an ex parte hearing. Eckerd also agrees to execute an Agreed Order to accompany this Assurance.

## **X. COMPLIANCE WITH ALL LAWS, REGULATIONS AND RULES**

10.1. Nothing in this Assurance or the Agreed Order of Dismissal shall be construed as relieving Eckerd of the obligation to comply with all state or federal laws, regulations or rules.

## **XI. APPLICABILITY OF ASSURANCE TO ECKERD**

11.1 The duties, responsibilities, burdens and obligations undertaken by Eckerd in connection with this Assurance shall apply to Eckerd Corporation.

11.2 As provided in paragraph 3.2, Eckerd agrees to provide notice to all pharmacists working in the State of Tennessee of the injunctive provisions of this Assurance or a summary thereof. As permitted by state law, any person having notice of an injunction who violates that injunction shall be subject to the jurisdiction of this court where the injunction is entered and subject to all remedies and penalties available at law.

## **XII. NOTIFICATION TO STATE**

12.1 For five (5) years following execution of this Assurance, Eckerd shall notify the Office of the Attorney General, in writing, at least thirty (30) days prior to the effective date of any proposed changes in its corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or firm, the creation or dissolution or subsidiaries, or any other changes in Eckerd's status, if any of the foregoing adversely affect compliance with obligations arising out of this Assurance.

12.2 Any notices required to be sent shall be under this Assurance of Voluntary Compliance shall be forwarded by registered or certified mail to:

Eckerd Corporation  
Attn: Vice President/General Counsel  
8333 Bryan Dairy Road  
Largo, FL 33777

Office of the Attorney General  
Attn: Deputy, Consumer Protection  
Div.  
425 Fifth Avenue North, 2nd floor  
Nashville, TN 37243

## **XIII. COURT COSTS**

13.1 All court costs associated with the filing and distribution of this Assurance and the Agreed Order

and any other incidental costs or expenses incurred thereby shall be borne by Eckerd. No costs shall be taxed against the State as provided by Tenn. Code Ann. § 47-18-116. Further, no discretionary costs shall be taxed to the State. Except as expressly provided herein, each party shall bear its own attorneys' fees associated with the filing and approval of this settlement.